



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARIO CERVANTES,
Petitioner,
v.
F. X. CHAVEZ, Warden,
Respondent.

Case No. CV 13-07023 JFW (AN)

**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the Court is a petition for writ of habeas corpus ("Petition") brought by Mario Cervantes ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises three claims directed at his conviction in the California Superior Court for Los Angeles County. Petitioner was convicted of first degree murder and attempted murder, and the jury found true firearm and criminal street gang enhancement allegations. Petitioner was sentenced to an indeterminate term of 92 years to life in state prison. (case no. BA187671).

For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”), 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte* if the court gives the petitioner adequate notice and an opportunity to respond. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). In most cases, the limitations period is triggered by “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

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1 The face of the Petition and relevant state court records^{1/} establish the following
 2 facts. Petitioner was sentenced for the above offenses on March 12, 2002. On June 2,
 3 2003, the California Court of Appeal affirmed the judgment (case no. B158299). The
 4 California Supreme Court then denied review of the court of appeal's decision on
 5 August 20, 2003 (case no. S117481). Petitioner has not alleged, and it does not appear,
 6 that he filed a petition for certiorari with the United States Supreme Court. (Pet. at 2-3;
 7 state court records.)

8 Therefore, for purposes of AEDPA's limitations period, Petitioner's judgment
 9 became final on November 18, 2003, the ninetieth day after the state high court denied
 10 his petition for review and the last day for him to file a petition for certiorari with the
 11 Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of
 12 limitations then started to run the next day, on November 19, 2003, and ended a year
 13 later on November 19, 2004. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*,
 14 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run on the
 15 day after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Petitioner did not
 16 constructively file his pending Petition until September 16, 2013 -- 3,223 days after
 17 the expiration of the limitations period.^{2/} Accordingly, absent some basis for tolling
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19 ^{1/} The Court takes judicial notice of Internet records relating to this action in
 20 the state appellate courts (available at <http://appellatecases.courtinfo.ca.gov>) ("state
 21 court records"). *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal
 22 courts may take judicial notice of related state court documents), *overruled on other*
grounds as recognized in Cross v. Sisto, 676 F.3d 1172 (9th Cir. 2012).

23 ^{2/} Pursuant to the "mailbox rule," a *pro se* prisoner's federal habeas petition
 24 is deemed to be filed on the date the prisoner delivers the petition to prison authorities
 25 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
 26 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *see also* Habeas Rule
 27 3(d). For purposes of the timeliness analysis, and absent any evidence to the contrary,
 28 the Court finds Petitioner constructively filed the Petition by delivering it to the prison
 mail system on September 16, 2013, which is the date that was handwritten by a prison
 (continued...)

1 or an alternative start date to the limitations period under 28 U.S.C. § 2244(d)(1), the
2 pending Petition is time-barred.

3 **C. Statutory Tolling**

4 AEDPA includes a statutory tolling provision that suspends the limitations
5 period for the time during which a “properly-filed” application for post-conviction or
6 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip v.*
7 *Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th
8 Cir. 2005). Neither the face of the Petition nor relevant state court records establish
9 Petitioner has filed any state habeas petitions challenging his judgment of conviction.
10 (Pet. at 3; state court records.) Consequently, Petitioner is not entitled to any statutory
11 tolling.

12 **D. Alternative Start of the Statute of Limitations**

13 **1. State-Created Impediment**

14 In rare instances, AEDPA’s one-year limitations period can run from “the date
15 on which the impediment to filing an application created by State action in violation
16 of the Constitution or laws of the United States is removed, if the applicant was
17 prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that
18 the statute of limitations was delayed by a state-created impediment requires
19 establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir.
20 2002). The Petition does not set forth any facts for an alternate start date of the
21 limitations period under this provision.

22 **2. Newly Recognized Constitutional Right**

23 AEDPA provides that, if a claim is based upon a constitutional right that is
24 newly recognized and applied retroactively to habeas cases by the United States
25 Supreme Court, the one-year limitations period begins to run on the date which the
26

27 ^{2/} (...continued)

28 official on the back of the envelope containing the Petition.

1 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).
2 The Petition does not set forth any facts for an alternate start date of the limitations
3 period under this provision.

4 **3. Discovery of Factual Predicate**

5 AEDPA also provides that, in certain cases, its one-year limitations period shall
6 run from “the date on which the factual predicate of the claim or claims presented
7 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
8 2244(d)(1)(D); *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012). The Petition
9 does not set forth any facts for an alternate start date of the limitations period under
10 this provision.

11 **E. Equitable Tolling**

12 AEDPA’s limitations period “is subject to equitable tolling in appropriate
13 cases.” *Holland v. Florida*, --- U.S. ---, 130 S. Ct. 2549, 2560 (2010). Specifically, “a
14 litigant seeking equitable tolling bears the burden of establishing two elements: (1)
15 that he has been pursuing his rights diligently, and (2) that some extraordinary
16 circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct.
17 1807 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079 (2007).

18 However, “[e]quitable tolling is justified in few cases” and “the threshold
19 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions
20 swallow the rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (*quoting*
21 *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)). Additionally, although “we
22 do not require [the petitioner] to carry a burden of persuasion at this stage in order to
23 merit further investigation into the merits of his argument for [equitable] tolling,”
24 *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003), “[w]here the record is amply
25 developed, and where it indicates that the [alleged extraordinary circumstance did not]
26 cause the untimely filing of his habeas petition, a district court is not obligated to hold
27 evidentiary hearings to further develop the factual record, notwithstanding a
28 petitioner’s allegations” *Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010);

1 *see also Elmore v. Brown*, 378 Fed. Appx. 664, 666 (9th Cir. 2010) (“[W]here the
2 record is sufficient to permit the district court - and us on appeal - to evaluate the
3 strength of the petitioner’s [equitable tolling] claim, the district court does not
4 necessarily abuse its discretion if it denies the petitioner a hearing.”) (cited pursuant
5 to 9th Cir. R. 36-3).

6 The Petition does not set forth any facts for equitable tolling.

7 **ORDER**

8 Based on the foregoing, the Court finds this action is untimely. Accordingly,
9 Petitioner shall have until **October 17, 2013**, to file a written response and show cause
10 why his Petition should not be dismissed with prejudice because it is time-barred. In
11 responding to this Order, Petitioner must show by declaration and any properly
12 authenticated exhibits what, if any, factual or legal basis he has for claiming that the
13 Court’s foregoing analysis is incorrect, or that AEDPA’s one-year statute of
14 limitations should be tolled, or the start date extended.

15 **Petitioner is warned that if a timely response to this Order is not made,**
16 **Petitioner will waive his right to respond and the Court will, without further**
17 **notice, issue an order dismissing the Petition, with prejudice, as time-barred.**

18 **Further, if Petitioner determines the Court’s analysis is correct and the**
19 **Petition is time-barred, he should consider filing a Request for Voluntary**
20 **Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response.**

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22 IT IS SO ORDERED.

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25 DATED: September 27, 2013

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27 ARTHUR NAKAZATO
28 UNITED STATES MAGISTRATE JUDGE